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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/664,101

09/17/2003

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F3315(C)

3698

201 7590 10/30/2008
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EXAMINER

BEKKER, KELLY JO

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

10/30/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/664,101	Applicant(s) BARTKOWSKA ET AL.	
	Examiner Kelly Bekker	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period **will** apply and **will** expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply **will**, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 06 October 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-5,20 and 21 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-5,20 and 21 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date: _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date: _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Amendments made 10/6/08 have been entered.
Claims 1-5, 20, and 21 remain pending.

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on October 6, 2008 has been entered.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

Claims 1-5 and 21 are rejected under 35 U.S.C. 102(a) as being anticipated by Koss (WO 02/094035 A1).

Koss teaches of a frozen products (Abstract) that are aerated with an overrun of 30% and has a pH of about 4.5 when frozen, and thus when melted (page 25 lines 17-21 and Example 3 pages 29 and 30). Koss teaches that the products include water

(Examples 2 and 3 pages 28-30), 1.8% nonfat dry milk or skim milk powder (page 9 lines 20-30 and Example 1 page 27), about 0.02-22% sweetener (page 4 lines 1-8 and page 14 lines 10-27), 0-20% fat (page 19 lines 20-26), and about 0.5-20% fruit puree, which inherently includes water soluble and water insoluble dietary fiber. Koss teaches that the composition contains no additional stabilizers, i.e. optionally includes stabilizers, (page 21 lines 1-3) and no additional emulsifiers, i.e. optionally includes emulsifiers, (page 9 lines 11-13). Koss teaches that a premix containing water, fat, nonfat milk solids, and sweetener is homogenized and pasteurized and then combined with a fruit puree containing fiber (page 4 lines 13-16, page 10 line 20 through page 11 line 3, page 23 lines 6-10, page 24 lines 1-32).

Regarding the specific amount of soluble and non soluble dietary fiber in the product as recited in claims 1, 4, and 5, Koss teaches that the composition contains 0.5-20% fruit puree and applicant states in the specification, page 5 line 30 through page 6 line 15, that the claimed dietary fiber is derived from about 5-80% fruit puree, thus one of ordinary skill in the art at the time the invention was made would expect the composition as taught by Koss inherently encompass the instantly claimed amount of fiber absent any clear and convincing arguments and/or evidence to the contrary.

Regarding the meltdown initiation time of the product, the resistance to meltdown and serum leakage properties of the product, as Koss teaches of a frozen product with substantially the same composition as that as instantly claimed, one of ordinary skill in the art at the time the invention was made would expect the frozen product as taught by Koss inherently have substantially the same properties, including meltdown initiation time, resistance to meltdown, and serum leakage properties, as the instantly claimed invention, absent any clear and convincing arguments and/or evidence to the contrary.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

The previous 103(a) rejection of claims 1-5 and 20-22 over Brake (US 6432466) in view of Jonas (US 4971824) has been withdrawn in light of applicant's amendments

made October 6, 2008. Specifically, due to the amendment that the references do not teach of a composition which contains no additional stabilizers or no additional emulsifiers as recited in instant claim 1.

Claim 20 is rejected under 35 U.S.C. 103(a) as Koss (WO 02/094035 A1) in view of Brake et al. (US 6432466 B2).

Koss teaches of a frozen confection containing a fruit puree and about 2% nonfat milk solids as discussed above. Koss is silent to the confection as including about 4-6.5% non-fat milk solids as recited in claim 20.

Brake et al. (Brake) teaches that milk solids non fat were included in confections from 0-10% in order to provide textural properties (Column 3 lines 16-25).

Regarding the confection as including about 4-6.5% non fat milk solids, it would have been obvious to one of ordinary skill in the art at the time the invention was made to adjust the nonfat milk solids to 0-10% depending on the desired textural properties of the final product as taught by Koss in view of Brake.

Claims 1-5, 20, and 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brake (US 6432466) in view of the combination of Jonas (US 4971824) and Arbuckle (Ice Cream, 2nd Edition 1972, page 96).

Brake teaches of a frozen product comprising about 3-32% sweetener (HFCS and sucrose), about 0.2-1.5% stabilizer, about 0-0.12% emulsifier, 0-10% non-fat milk solids, 0-5% milk fat, water, and 20-90% fruit puree, which inherently contain soluble and insoluble dietary fiber (Abstract). Brake teaches that the composition does not include additional emulsifiers by teaching that the composition includes 0% emulsifiers. Brake teaches that a premix containing water, fat, milks solids non fat, and sweetener are homogenized and pasteurized, held while allowed to cool, and then added to a fruit puree (Column 4 line 66 through Column 5 line 18).

Brake, however, is silent to the overrun of the aerated product as recited in claim 1, to the pH of the product when melted as recited in claim 1, to the specific amount of soluble and non soluble dietary fiber in the product as recited in claims 1, 4, and 5, to

the composition as containing no additional stabilizers as recited in claim 1, and to the meltdown initiation time, meltdown resistance and serum leakage properties of the product as recited in claim 21.

Jones teaches of a frozen dessert comprising fruit puree. Jones teaches that pH must be adjusted within the appropriate range. Jones teaches that a pH which is too high results in an unset food which remains liquid after processing; and pH which is too high results in a product which can separate. Jones teaches that the pH is less than about 4.5. Refer specifically to Column 2 lines 47-68. Jones teaches of an overrun 18-100 (Column 2 lines 47-53) and that the overrun is adjusted depending on the desired form and hardness of the final product (Column 3 lines 12-28).

Arbuckle teaches that stabilizers and emulsifiers are generally included in frozen confections, however, many excellent frozen confections are made without additional stabilizers and emulsifiers, such as when milk and milk products, which naturally contain stabilizers and emulsifiers, are included in the confections (page 96).

Regarding the overrun of the aerated product, it would have been obvious to one of ordinary skill in the art at the time the invention was made to aerate the frozen product to a specific amount depending on the final form and hardness of the final product, as taught by Jones. To do so would be within the ordinary skill and ingenuity of one of ordinary skill in the art and would not impart a patentable distinction to the claims.

Regarding the pH of the product when melted, it would have been obvious to one of ordinary skill in the art at the time the invention was made to adjust the pH of the frozen composition to about 4.5 in order to form a final product which did not remain liquid or separate after processing as taught by Jones.

Regarding the specific amount of soluble and non soluble dietary fiber in the product, Brake teaches that the composition contains 20-90% fruit puree, applicant teaches that the claimed dietary fiber is derived from about 5-80% fruit puree, thus one of ordinary skill in the art at the time the invention was made would expect the composition as taught by Brake to contain the instantly claimed amount of fiber absent any clear and convincing arguments and/or evidence to the contrary.

Regarding the composition as containing no additional stabilizers, Brake teaches of adding about 0.2-1.5% stabilizers, 0-10% non fat milk solids, and 0-5% milk fat. It would have been obvious to one of ordinary skill in the art at the time the invention was made to not include additional stabilizers if the stabilizers were inherently included in the other compositional ingredients, such as the 0-10% nonfat milk solids or 0-5% milk fat, as taught by Arbuckle.

Regarding the meltdown initiation time of the product and the meltdown resistance and serum leakage properties, Brake discloses of a frozen product with substantially the same composition produced by substantially the same method as the product as instantly claimed, thus one of ordinary skill in the art at the time the invention was made would expect the frozen product as taught by Brake to possess substantially the same properties as the instantly claimed invention, including meltdown initiation time, meltdown resistance, and serum leakage properties absent any clear and convincing arguments and/or evidence to the contrary.

Response to Arguments

Applicant's arguments with respect to claims 1-5, 20, and 21, specifically including the limitation "no additional stabilizers and no additional emulsifiers" have been considered but are moot in view of the new ground(s) of rejection.

Applicant's arguments regarding newly added limitations have been addressed in the rejection above.

Applicant's arguments with respect to the references of record have been fully considered but they are not persuasive.

Applicant argues that the references of record do not teach of the iso-electric point of the proteins and the processing steps in a particular method. Applicant is referred to Brake, Column 4 line 66 through Column 5 line 18, in which Brake teaches a particular method for the processing steps, including homogenizing and pasteurizing a premix containing water, fat, milks solids non fat, and sweetener, holding while allowing the premix to cool, and then adding the premix to a fruit puree. Furthermore, it is noted that the features upon which applicant relies (i.e., the iso-electric point) are not recited in

the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Specifically, applicant argues that Jonas does not disclose milk solids or added sugars in combination with fruit purees. Applicant is referred to Brake which discloses milk solids and sugars in combination with fruit purees, as discussed in the rejection above.

Applicant argues that it would not have been obvious to combine the Brake and Jonas reference and that hindsight was utilized. The examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). Furthermore, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). In this case, both references teach of frozen confectionaries and the knowledge of the prior art, i.e. Jonas, supports modifying the reference of Brake. Specifically, Jonas teaches that a pH of about 4.5 forms a final product which does not remain liquid or separate after processing as taught by Jones. Thus, one would have been motivated to adjust the pH of the frozen composition to about 4.5 in order to form a final product which did not remain liquid or separate after processing as taught by Brake in view of Jones.

In response to applicant's argument that Jonas cannot be combined with Brake because Jonas does not teach of dairy in the frozen dessert, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Bekker whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lien Tran/
Primary Examiner
Art Unit 1794

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Examiner
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